88-729

Supreme Court, U.S.
FILED
OCT 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1988

ROBERT ROWE, ET. AL.,
Petitioners,

v.

ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN, ET. AL.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DONALD J. MARES
LAW OFFICES OF
MCKENDREE, TOLL & MARES
1244 Grant Street
Denver, Colorado 80203
(303) 861-8906

JOHN W. MCKENDREE, GENERAL COUNSEL
OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION
P.O. Box 2812
Denver, Colorado 80201
(303) 987-2229

(Counsel for Petitioners)

45 pp

TABLE OF CONTENTS

DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS (AUGUST 16, 1988) 1a
MEMORANDUM OPINION AND ORDER (APRIL 1, 1987) 13a
MAGISTRATE'S REPORT AND RECOMMENDATION (JANUARY 6, 1987) 22a
MEMORANDUM OPINION AND ORDER (SEPTEMBER 18, 1986) 31a
MAGISTRATE'S REPORT AND RECOMMENDATION (JUNE 10, 1986) 37a

APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. **This notice is to be *prominently* displayed if this decision is reproduced.**

NOT FOR PUBLICATION

NO. 87-5480
DECIDED AUGUST 16, 1988
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT ROWE, ET AL.,	)
	)
Plaintiffs-Appellants,	) ON APPEAL FROM THE
	) UNITED STATES
v.	) DISTRICT COURT FOR
	) THE EASTERN DISTRICT
ALLIED CHEMICAL HOURLY	) OF KENTUCKY
EMPLOYEES' PENSION PLAN	)
ET AL.,	)
	)
Defendants-Appellees	)

BEFORE: LIVELY, KRUPANSKY and BOGGS, Circuit Judges.

PER CURIAM. Plaintiffs, the Oil, Chemical and Atomic Workers International Union ("OCAW"), its Local 3-523 and some eighty OCAW members, appeal the district court's decisions granting summary judgment in favor of the defendants, Allied Corporation (Allied), the Allied Chemical Hourly Employees' Pension Plan (Allied Plan), Armco, Inc. (Armco), and the Armco, Inc. Pension Plan (Armco Plan). This case involves the OCAW member's entitlement to various pension benefits, following the sale of Allied's Ashland coke plant to

Armco and the transfer of pension assets from the Allied Plan to the Armco Plan in accordance with the sales agreement. After carefully reviewing the plaintiffs' contentions, we affirm the entry of summary judgment in favor of the defendants.

I

The facts are largely undisputed. The Allied Plan is a collectively bargained pension plan covering allied workers who are represented by the OCAW. Three provisions are involved in this case. The allied Plan contains an "80-point" provision in Article IV(2) (a), which permits early retirement when the sum of an employee's age and length of service with Allied is 80 or more. The Plan also contains a provision describing the computation of credited service with Allied for the purpose of determining 80-point pension eligibility for employees who are laid off:

> If an employee is laid off for any reason within three years of the date that he would be eligible to retire under Article IV(2) (a hereof, he will receive credit for the period of layoff from the effective date up to the date his age and years of credited service, including such period of layoff, equals 80.

Article IX(4) (a). Finally, the Allied Plan includes a Social Security "leveling provision," which is available to employees who retire before becoming eligible for Social Security. This provision provides for an optional method of leveling a pensioner's income throughout the retirement years by taking into account the pensioner's Social Security income. Article VII states:

> An employee retiring under the provisions of Article IV(2a) or (2c) hereof before he first becomes eligible to receive Social Security payments may elect to receive an actuarially equivalent retirement income providing larger monthly payments, in lieu of the retirement income otherwise payable upon early retirement, until the date he first becomes eligible to receive Social Security payments; thereafter, his monthly payments shall be reduced by the approximate amount of his monthly Social Security benefit. Insofar as practical, therefore, a level total retirement income will be available for the pensioner.

Under the terms of the sales agreement between Allied and Armco, Armco agreed to provide 80-point pensions under the Armco Plan to those Allied employees who were employed by Armco and who were eligible to receive the 80-point pension under the terms of the Allied Plan as of the closing date of sale (December 31, 1981). This special provision was made to accommodate these pensioners in the Armco Plan because that plan did not contain an 80-point benefit provision.

Allied also agreed to transfer to the Armco Plan assets equivalent to the actuarial value of the benefits earned by Allied employees as of the date of sale. For each employee for whom funds were transferred, Armco agreed to credit service under the Allied Plan for eligibility or vesting. Employees cold then elect benefits under the Armco Plan based on their entire length of Allied-Armco service, or they could elect the pension accrued with Allied as of the sale date, plus any benefits accrued with Armco subsequent to the sale. However, the Allied employees who were not hired by Armco or who chose to retire at the time of the sale continued to be covered solely under the Allied Plan.

Preceding the sale of the coke plant, Allied and OCAW representatives met on a number of occasions to discuss the impact of the sale. Allied advised employees who were eligible for an 80-point pension of their options under the sales agreement. In particular, they were told that the Armco plan did not contain a Social Security leveling provision equivalent to the one in the Allied Plan. If they wished to elect this option, they had to do so before they began working for Armco.

There are three groups of plaintiffs in this case:

Group 1 As of the sale date, the Group 1 plaintiffs were actively employed by allied. All were offered and accepted immediate employment with Armco. On the sale date, however, no Group 1 plaintiff was eligible to retire under the 80-point provision of the Allied Plan; all but one were within three years of reaching 80 points.

Under the sales agreement, Armco credited the Group 1 plaintiffs' Allied service under the Armco plan, and Allied transferred assets to the Armco Plan to cover that service. However, the Group 1 plaintiffs, since they had not attained 80 points when they accepted Armco employment, were not covered by Armco's agreement to provide the 80-point pension.

The Group 1 plaintiffs attained 80 points while working for Armco and thus applied for an Allied 80-point pension under Article IX(4) (a) of the Allied Plan. They claimed that the sale effected a layoff which entitled them to continuing service credit under Article (IX(4) (a). The Allied Plan denied the pension requests because these plaintiffs were no longer participants in the Allied Plan and were never laid off from Allied.

Group 2 These plaintiffs also accepted employment with Armco immediately following the sale, with no break in service. Unlike Group 1, however, these plaintiffs had reached 80 points at the time of the sale and thus were entitled to 80-point pensions under the sales agreement. Group 2 plaintiffs claim they should receive an 80-point pension under the allied Plan while continuing to work for Armco. The plaintiffs applied to the allied Plan, which denied the pension requests because they had not elected to retire while they were Allied employees and participants in the Allied Plan. Since provision had been made to pay the benefits under the Armco Plan, Group 2 plaintiffs need only retire under that Plan to receive the 80-point pension. The record indicates that several employees have already done so since this litigation commenced.

Group 3 These plaintiffs also had achieved 80 points when the sale took place. Unlike Group 2, however, these plaintiffs elected to retire from allied and are receiving 80-point pensions, including the social Security leveling option afforded under the Allied Plan. Group 3 plaintiffs contend they were wrongfully induced to retire by representations that the Social Security option would be unavailable if they accepted Armco employment and became participants in the Armco Plan. The undisputed facts show that the Armco Plan did not contain a Social Security leveling provision, and that all communications

made by Armco representatives to allied representatives before the sale were that no Social Security option would be provided. Armco did not formulate and communicate a policy decision to provide the option until plaintiffs' counsel demanded the option on behalf of a former Allied employee, nearly a year after the sale.

Plaintiffs filed this suit, alleging a multitude of contentions. In Counts I and III, Group 1 and 2 plaintiffs alleged that the Allied defendants, by denying 80-point pensions under the Allied Plan, violated the Allied Plan and breached their fiduciary duties under section 404 of Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. section 1104. In Counts II and IV, these plaintiffs also alleged that the Allied defendants failed to transfer to the Armco Plan sufficient assets to pay their 80-point pensions, in violation of section 208 of that statute, 29 U.S.C. section 1058.

In Counts V and VA, the Group 3 plaintiffs alleged that the Allied and Armco defendants wrongfully induced them to retire by misrepresentations that a Social Security leveling option would not be available under the Armco Plan. These counts are based on section 404 of ERISA and common law duties. Finally, in Count VI, the plaintiffs alleged that the Allied defendants breached their agreement with OCAW to abide by the terms of the Allied Plan, thus violating section 301(a) of the Labor-Management Relations Act, 29 U.S.C. 185 (a).

The district court rejected all the plaintiffs' contentions. With respect to the first four counts, the district court concluded: 1) the Allied defendants' conduct in denying Group 1 and 2 plaintiffs 80-point pensions under the Allied Plan was neither arbitrary nor capricious; 2) the Allied defendants did not unilaterally amend the Allied Plan; 3) the transfer of assets from the Allied Plan to the Armco Plan did not violate section 208; that provision protects only accrued benefits, yet the early retirement benefits at issue were not accrued benefits; 4) the allied defendants did not breach their fiduciary duties under section 404; and 5) any state law claims were preempted by ERISA.

With respect to the remaining counts, the district court concluded: 1) the Allied defendants owed no fiduciary duty to the Group 3 plaintiffs because the Social Security option was not an accrued benefit; 2) the Allied defendants acted reasonably in relying on the Armco defendants' repeated assurances that Armco would not offer the option; 3) the Group 3 plaintiffs were not employed by Armco and could not be viewed as participants in the Armco Plan; the court thus lacked subject matter jurisdiction over their claims against the Armco defendants; and 4) the plaintiffs' section 301 breach of contract claim was barred by their failure to exhaust the contractual grievance procedures and by the six-month statute of limitations.

II

Plaintiffs argue that the district court erred in concluding that allied's denial of the 80-point pensions to Group 1 and 2 plaintiffs was based on a justifiable interpretation of the Allied Plan. The appropriate standard of review for decisions of plan administrators under ERISA "is whether the decision was arbitrary, capricious, or in bad faith." *Adcock v. Firestone Tire and Rubber Co.*, 822 F.2d 623, 626 (6th Cir. 1987); *Varhola v. Doe*, 820 F.2d, 809, 812-13 (6th Cir. 1987). If the plan administrator's interpretation of a plan ambiguity is rational, courts should defer to the interpretation "in the interest of efficient pension administration." *Cook v. Pension Plan for Salaried Employees*, 801 F.2d 865, 871 (6th Cir. 1986).

The Group 1 plaintiffs contend that the sale of the coke plant resulted in a layoff, which entitled them to continuing service credit under Article IX(4) (a) of the Allied Plan. We rule, however, that it was not arbitrary or capricious to conclude that these plaintiffs, having suffered no break in employment, were not laid off within the meaning of Article IX(4) (a). Thus, the Group 1 plaintiffs were not eligible for the Allied 80-point benefit because they ceased to be Allied employees before they satisfied the preconditions for eligibility.

Article IX(4) (a) does not state that any separation from Allied employment triggers the layoff provision; it states only that a

layoff triggers the provision. Yet, all the Group 1 employees went directly from Allied to Armco without a break in service, and each received credit under the Armco Plan for his year of service with Allied. Conversely, Allied employees who were on layoff status at the time of the plant sale and were not recalled to work by Armco did accrue service credit under Article IX(4) (a). The plan administrator's interpretation of "layoff" as requiring a period of unemployment is supported by case law. *See, e.g., Jung v. FMC Corp.*, 755 F.2d 708, 712-13 (9th Cir. 1985); *Pabst Brewing Co. v. Anger*, 610 F. Supp. 214 (D. Minn. 1985), *aff'd*, 784 F.2d 338 (8th Cir. 1986).

We also agree with the district court that it was not arbitrary or capricious to deny the Group 2 plaintiffs an 80-point pension because they did not retire under the Allied Plan while they were Allied employees and participants in that plan. Under Article IV(2) (a) and Article V[1], retirement from Allied is a prerequisite to receiving the 80-point pension under the allied Plan. It is undisputed that each Group 2 plaintiff was counseled by Allied representatives before the plant sale that he could retire from Allied and receive the 80-point pension, or go to work for Armco and receive the 80-point pension upon retirement from Armco. When these plaintiffs did not retire from Allied, the assets to fund their 80-point benefits were transferred from Allied to Armco.

If the Group 2 plaintiffs wanted the 80-point pension, yet still wanted to work for Armco, they could have retired from Allied and then sought employment with Armco. Instead, they chose guaranteed employment with Armco, at which point allied transferred assets to the Armco Plan for their pension. Thus, when these plaintiffs later sought benefits from Allied, the Allied defendants properly determined that plaintiffs had failed to retire while they were participants in the Allied Plan.

III

Next, plaintiffs content that the Allied defendants unilaterally amended the Allied Plan to eliminate the Group 1 and Group 2 plaintiffs' 80-point pensions, in violation of their fiduciary duties under section 404 of ERISA. The Allied defendants amended the

Plan, plaintiffs assert, by "imposing new conditions and/or a different interpretation on the Allied Plan's provisions."

This argument, however, is nothing more than a recasting of plaintiff's previous contention that the plan administrator's interpretation of the Allied Plan was arbitrary and capricious. As the Allied defendants correctly point out, the "alleged 'amendments' are really disputes over Plaintiffs' satisfaction of the pre-conditions for benefits described in the [Allied] Plan's terms." We have already concluded that the district court was correct in concluding that the plan administrator's interpretation of the Allied Plan was not arbitrary or capricious. The lower court also rules, correctly in our view, that the Allied defendants did not unilaterally amend the Allied Plan, as the plaintiffs contend. The defendants' interpretation of the Allied Plan, rather than amending the Plan in any respect, merely gave substance and effect to existing provisions. We find the plaintiff's section 404 claim to be without merit.

IV

Plaintiff's next contention is based on section 208 of ERISA:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan . . . unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated).

29 U.S.C. section 1058. They argue that the Allied defendants violated this provision by failing to transfer to the Armco Plan sufficient assets to pay the 80-point pensions to the Group 1 and Group 2 plaintiffs. We disagree.

Under section 208, we must compare the benefits an employee would receive before the transfer of assets (had the plan terminated) with the benefits he or she would receive after a transfer (had the new plan terminated). The Group 1 plain-

tiffs were not entitled to receive an 80-point pension immediately before the transfer because, as we discussed earlier, they had not satisfied the eligibility requirements of the Plan. Specifically, the sum of their age and service did not equal or exceed 80 on the sale date. Section 208 does not require the preservation of a benefit for which the plaintiffs were ineligible when the transfer occurred. Thus, the Allied defendants did not violate section 208 by failing to transfer sufficient assets to the Armco Plan to fund 80-point benefits for these plaintiffs[2]

Plaintiffs claim on behalf of Group 2 plaintiffs is equally without merit. At the time of the transfer, these plaintiffs were entitled to receive under the Armco Plan the same benefits as they would have received if they had remained in the Allied Plan and that Plan had then terminated. *See Dougherty v. Chrysler Motors Corp.*, 840 F.2d 2, 4 (6th Cir. 1988). The Group 2 plaintiffs were entitled to an 80-point pension under the Allied Plan before the transfer, and they are not entitled to an 80-point pension under the Armco Plan. The record is undisputed that Allied transferred assets to the Armco Plan to fund the 80-point pensions. Moreover, it was stipulated that several Group 2 plaintiffs who retired from Armco after this litigation commenced were receiving an 80-point benefit.

V

The Group 3 plaintiffs argue that the Allied defendants breached their fiduciary duties under section 404 of ERISA, by failing to advise them accurately regarding the availability of the Social Security leveling option under the Armco plan. They contend the Allied defendants wrongfully induced them to retire from Allied and forego Armco employment by misrepresenting to them that the option would not be available at Armco. We disagree.

We note at the outset that the plaintiffs do not claim that the Allied defendants haver terminated their contractual right to the option, inasmuch as they are currently receiving it. The Social Security option remains in the Allied Plan, has not been modified, and each Group 3 plaintiff who elected the option has

had the benefit of the provision. Moreover, Allied was not under a fiduciary duty to maintain the option either directly or through Armco because the option was a contingent, early retirement, benefit which Allied was not required to maintain. *Sutton v. Weirton Steel Division*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). The legislative history of ERISA expressly mentions Social Security options as forfeitable and subject to amendment without implicating ERISA's fiduciary standards. H.R. Rep. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4726. *See also* H.R. Conf. Rep. 1280, 93d Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5054. It follows then that the Allied defendants did not have a fiduciary duty to provide information to these plaintiffs concerning the availability of the option in another employer's plan.

In any event, plaintiff's contention that the Allied defendants breached their fiduciary duty by not advising them accurately of their pension rights with Armco is without merit. There is no indication that Allied supplied false information, and it was reasonable for these defendants to rely on the repeated assurances of Armco that the Social Security option would not be provided under the Armco Plan. Ad Allied notes, "Armco's decision a year later [after the sale] to provide the option does not retroactively convert Allied's statements, which were true when made, into falsehoods." We also reject plaintiff's common law based claims, on the basis of the opinions below. The magistrate concluded, and the district court agreed, that Allied acted reasonable in relying on the repeated assurances of Armco that Armco would not offer the option. We agree with this conclusion and, therefore, do not address the possible preemption questions raised. *See Pilot Life Insurance Co. v. Dedeaux*, __ U.S. __, 107 S.Ct. 1549 (1987).

The Group 3 plaintiffs raise similar arguments against the Armco defendants; that is, that these defendants' failure to inform either Allied or the plaintiffs of their intention to furnish the Social Security option constituted misrepresentation in breach of ERISA fiduciary and common law duties.

The district court properly rejected this argument on jurisdictional grounds. ERISA establishes limits on who may sue for breach of fiduciary duties. "Although ERISA does mandate fiduciary duties with respect to employee benefit plans, such duties are solely with respect to participants." *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986). The plaintiffs readily concede as much, when they say that "[t]he lower court was correct in its determination that it lacks subject matter jurisdiction over the Group 3 Plaintiffs' ERISA claims against Armco, if they are not or were not participants in the Armco Plan."

The Group 3 plaintiffs are not "participants" within the meaning of ERISA, 29 U.S.C. section 1002(7), because they were never employed by Armco, nor did they have any participation in the Armco Plan. *See Stanton*, 792 F.2d at 434-45; *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.), *cert. denied*, __ U.S. __, 107 S.Ct. 318 (1986). No contributions were ever made by Armco on their behalf. *Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group*, 721 F.2d 654, 655 (9th Cir. 1983). The plaintiffs have received all the benefits they were entitled to under the Allied Plan, and they are now seeking only damages. "Because, if successful, the plaintiffs' claim would result in a damage award, not in an increase of vested benefits, they are not plan participants." *Kuntz*, 785 F.2d at 1411. Plaintiffs alleged merely the "breach off fiduciary duty or of a duty to disclose information about benefits, [and] thus any recoverable damages would not be benefits from the plan." *Ibid.*

Plaintiffs argue they qualify as "participants" because they are former members of an employee organization, OCAW, and they were eligible to receive benefits under the Armco Plan. To be sure, the definition of "participant" encompasses a "former member of an employee organization, who is eligible or may become eligible to receive a benefit of any type from an employee benefit plan. . . ." 29 U.S.C. section 1002(7). Although plaintiffs say they were eligible to receive the Social Security option under the Armco Plan, the sales agreement accorded rights under that Plan only to former Allied employees whom

Armco hired. Moreover, the "may become eligible" language "applies only to current employees." *Freeman*, 721 F.2d at 655. *See also Stanton*, 792 F.2d at 432. The Group 3 plaintiffs were never employees of Armco, and therefore they are not "participants" within the meaning of ERISA. Accordingly, they may not sue Armco for breach of fiduciary duty. *Freeman*, 721 F.2d at 655. *See Coleman v. General Electric Co.*, 643 F. Supp. 1229, 1234-36 (E.D. Tenn 1986), *aff'd*, 822 F.2d 59 (6th Cir. 1987)[3] In any event, the Social Security option, as noted earlier, is not an accrued benefit under ERISA; it could be amended or even eliminated, and any decision in that respect would not be reviewable under ERISA's fiduciary standards. *See supra* at 13.

We have reviewed the remaining contentions and, finding them to be without merit, we AFFIRM the judgments of the district court.

MANDATE ISSUED: 8/16/88

COSTS TAXED: NONE

---

[1] Article V states that "[a]n employee meeting the eligibility requirements of Article IV will be entitled to receive a pension each month beginning with the month following that in which his *retirement* takes place. . . ." (emphasis added).

[2] Plaintiffs do not contend that the Allied defendants failed to transfer sufficient assets to the Armco Plan to cover whatever benefits they were entitled to before the sale date under the Allied Plan.

[3] Because neither the magistrate nor the district court reached the merits of the common law claims, we decline to address these issues.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 83-282
DECIDED APRIL 1, 1987

ROBERT ROWE AND EUGENE S. DUNCAN, PLAINTIFFS

VS.

ALLIED CHEMICAL HOURLY EMPLOYEES
PENSION PLAN AND ALLIED CORPORATION, DEFENDANTS

and

CIVIL ACTION NO. 84-278

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, ET AL., PLAINTIFFS

VS.

ALLIED CORPORATION, ET AL.,
DEFENDANTS

MEMORANDUM OPINION AND ORDER

This matter is presently before the Court upon cross-motions for summary judgment filed by the defendants Armco and Allied. The Court referred this matter to the United States Magistrate Joseph M. Hood for initial consideration and recommendation pursuant to 28 U.S.C. 636(b) (1) (B).

The Magistrate has filed his report and recommendation, in which he recommends granting the motions for summary judgment. These cross-motions for summary judgment pertain only to the Group 3 plaintiffs' claims in Counts V, VI, and VA of the First Amended Complaint. [Record #104]. The Group 3 plaintiffs [hereinafter referred to as the plaintiffs], Allied and Armco have filed objections to the report and recommendation. The

Court has considered the entire record. The Court will address the report and recommendation and the objections by discussing each of the three counts separately.

Count V: Allied's Negligent Misrepresentation

In this count, the plaintiffs claim that Allied has breached fiduciary duties owed to the plaintiffs by negligently misrepresenting the plaintiffs' pension rights. The plaintiffs contend that Allied's representation that the Social Security Option of Allied's Pension Plan would not be offered to the plaintiffs by Armco was a negligent misrepresentation because the representation was contrary to (1) rights the plaintiffs had rights under the Allied Plan; (2) to plaintiffs' rights under section 2.05(f) (iii) of the Sales Agreement between Allied and Armco; and (3) Armco's intention to offer the option to the plaintiffs.

In his report and recommendation, the Magistrate found that since this claim was brought under ERISA, 29 U.S.C. section 1104, for breach of fiduciary duty, the claim was not time-barred. The Magistrate correctly found that the applicable statue of limitations for this claim is 29 U.S.C. section 1113(a) of ERISA. The introductory language of this statue of limitations indicates that it applies to *all* actions under ERISA for breaches of fiduciary duties: "No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation [time limits omitted]. . ." The defendants have argued that a six-month statue of limitations like that applied to section 301 "hybrid" actions under the Labor Management Relations Act, 29 U.S.C. section 185, should be applied to Count V. The court is not persuaded by this argument.

The Magistrate has concluded that the social security option of the Allied Plan was not an "accrued benefit" and therefore the plaintiffs were not entitled to fiduciary duties with respect to the option. As authority for this determination, the Magistrate has cited *Sutton v. Weirton Steel Div.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); *United Electrical Radio and Machine Workers of America v. Amcase Industrial Corp.*, 634 F.Supp. 1135, 1142 (S.D. Ohio 1986); and *McBarron*

v. S & T Industries, Inc., 771 F.2d 94, 99 (6th Cir. 1985).

The Court has considered the authorities cited and has found that the Magistrate's conclusion is amply supported. Like Allied's sale of the coke plant to Armco, in *Sutton*, 724 F.2d 406, National Steel Corporation sold one of its divisions to another corporation, and some of the division's employees sued National, National's Pension Plan, and the Independent Steel Workers Union. The suit arose from the fact that the sales agreement eliminated the early retirement benefits offered in the National Plan. The critical question was whether or not ERISA imposed any fiduciary duty to maintain the contingent, early retirement benefits which the plaintiffs had in the National Pension Plan. The Court held that National had no fiduciary duties under ERISA with respect to the contingent, early retirement benefits and stated:

> Under ERISA's vesting rules, only accrued benefits must be nonforfeitable. 29 U.S.C. section 1053(a). With respect to the issues raised by these appeals, ERISA defines an accrued benefit as an "annual benefit commencing at normal retirement age." 29 U.S.C. section 1002(23). The accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance payments. The Act was not designed to prohibit modification of these ancillary benefits. *See* H.R.Conf.R. No. 1280, 93d Cong., 2d Sess. 273, *reprinted in* 1974 U.S.Code Cong. & Ad. News 4639, 5038, 5054; H.R. Rep. No. 807, 93d Cong., 2d Sess. 60-61, *reprinted in* 1974 U.S. Cong. & Ad. News 4639, 4670, 4726. . . . An employer may change such benefits without violating ERISA. . .Any right to payment of benefits before normal retirement age must be found in pertinent employment agreements.

Sutton, 724 F.2d at 410.

Actually, the legislative history of ERISA answers the question at issue:

> [T]he accrued benefit to which the vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age, or so-called social security supplements which are commonly paid in the case of early retirement but then cease when the retiree attains the age at which he becomes entitled to receive current social security benefits. . . .

H.R.Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code & Ad. News 4726; and H.Conf.Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5054.

The plaintiffs have vehemently objected to the Magistrate's analysis of Count V. They contend that benefits under ERISA need not be "accrued" for the plaintiffs to enjoy the protections of the Act and to be entitled to the fiduciary duties provided by the Act. They have cited *Amato v. Western Union International Inc.*, 773 F.2d 1402, 1415-16 (2d Cir. 1985), wherein the Second Circuit held that the plaintiffs had stated cognizable claims under ERISA and common law where the employer had modified the pension plan to decrease or eliminate certain *unreduced* early retirement benefits (i.e. *full* retirement benefits which were payable upon the employee's reaching a certain number of years of service or payable when the employee's age and years of service totalled eighty). *Id.* at 1420.

The Court has considered *Amato, supra*, and the plaintiff's arguments; however, the Court has determined that *Amato* is inapposite to disposition of the case at bar. As the Second Circuit stated, "Social security supplements which cease upon the employee's reaching normal retirement age. . .differ entirely from the unreduced retirement benefits to which an employee might become entitled under a retirement plan."

The Magistrate has also stated that the plaintiffs have failed to state a claim against Allied for common law misrepresentation. According to the plaintiff, the proper standard is set forth in the Restatement (Second) Torts, Section 552, which states in part:

> Section 552. Information Negligently Supplied for the Guidance of Others. (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to *exercise reasonable care or competence in obtaining or communicating the information.*

In applying this standard, the Magistrate concluded that the plaintiffs had justifiably relied upon the information supplied to them by Allied that Armco would not offer the social security option in choosing to retire from Allied rather than going to work for Armco. The Magistrate noted that since the information later proved to be false, the question is whether Allied failed to exercise "reasonable care. . .in obtaining. . .the information." The Magistrate considered the facts of the case and concluded that Allied acted reasonably in relying upon the repeated assurances of Armco that Armco would not offer the option.

The plaintiffs have objected to the Magistrate's findings. They argue that the Magistrate's conclusion is based upon the false premise that Allied was powerless to discover Armco's true intent concerning offering the option. It is unclear why the plaintiffs feel that the foregoing is a false premise. The Court can find no evidence which suggests Allied could have discovered Armco's decision to offer the option any earlier than Allied did.

Armco has objected to the Magistrate's statement that the plaintiffs justifiably relied upon Allied's statement that Armco would not offer the option. Armco contends that the record is devoid of evidence indicating that Armco's decision not to offer the option motivated the plaintiffs to retire from Allied. The Court has determined that at the very least the Magistrate's statement is a proper inference to be drawn from the undisputed facts surrounding the claims in Count V.

Additionally, Armco has objected to the Magistrate's statement that the information Allied supplied to the plaintiffs "later proved to be false." Armco seeks clarification of this statement.

The Court has considered the context of the statement and has determined that the Magistrate meant only to say that later Armco did in fact offer the option and not to imply that Armco had lied about its intent to offer the option.

Accordingly, the Court finds that the Magistrate properly concluded that the plaintiffs have no cause of action under ERISA against Allied in Count V..

Count VA: Armco's Breach of Fiduciary Duties and Negligent Misrepresentation

The plaintiffs have alleged that Armco's failure to inform either them or Allied of its intention to offer the option was misrepresentation in breach of Armco's fiduciary duties under ERISA and common law. In support of this allegation, the plaintiffs argue that by agreeing in principle and under the sales agreement to the preservation of pension rights, Armco conferred "unknowing" participant status upon the plaintiffs and thereby became a "constructive fiduciary."

The Magistrate did not find the plaintiffs' argument persuasive, and he noted that one must be a participant of a plan to file an action under ERISA according to 29 U.S.C. section 1132. The Magistrate stated that the plaintiffs could never be viewed as participants because they were not employed by Armco. *See Freeman v. Jacques Orthopaedic Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 656 (5th Cir. 1980). As a result, the Magistrate concluded that this Court lacks subject matter jurisdiction under 29 U.S.C. section 1132.

The plaintiffs have objected to the Magistrate's findings as restated above. The plaintiffs argue that the Magistrate's conclusion is the result of a false premise that if the plan fiduciaries do not consider certain individuals to be participants, then they are not participants. This objection is wholly without merit. The premise behind the Magistrate's conclusion is that because the plaintiffs retired from Allied before ever working for Armco, they are not participants of Armco's plan.

Count VI: Allied's Breach of the Collective Bargaining Agreement

The Court begins its analysis of Count VI by stating that this count is inartfully plead.

Count VI provides:

> Plaintiffs reallege paragraphs 1 through 97 of the complaint. The Allied Plan governing the pension rights and benefits of coke plant employees is the product of collective bargaining by Allied and the OCAW. By violating the provisions of the Allied Plan in the manner set forth in the complaint, Allied breached its agreement with the OCAW to abide by the terms of the Plan. Allied is liable to the OCAW and its members for such breach.

[No. 104, p. 51].

To the extent that this breach of the collective bargaining claim concerns Counts 1-4, this Court stands by its earlier findings and conclusions stated in the preceding opinion [No. 131, Sept. 19, 1986]. To the extent Count VI concerns Counts V and VA, the Court stands on its conclusions stated in this opinion. Although the plaintiffs contend that Count VI is an ERISA-based claim, it is not. The plaintiffs do not have cause of action under ERISA with respect to the social security option because the option does not constitute "accrued benefits." [See *supra*, Count V discussion.

After consideration of the entire record, the Court has concluded that Count VI is section 301 claim under the Labor Management Relations Act, 29 U.S.C. section 185. The plaintiffs have ignored the reality that Count VI is a section 301 claim and have objected to the Magistrate's finding that this claim is anything other than an ERISA-based claim. The defendants have plead as an affirmative defense the plaintiffs' failure to exhaust the exclusive contractual grievance procedures and have argued that the section 301 claim is time-barred by the six-month statute of limitations applied by the Supreme Court to a hybrid section 301/fair representation action in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

The Court has concluded that Court VI, the plaintiff's claims for breach of the collective bargaining agreement, is barred by their failure to exhaust. The plaintiff employees have not alleged that they asked the OCAW to file a grievance on their behalf concerning Allied's breach of this term of the collective bargaining agreement. "Exhaustion of grievance and arbitration procedures [contained in the collective bargaining agreement] is a prerequisite to a section 301 action by an employee against an employer for breach of a labor contract." *Apponi*, slip. op. at 8, (6th Cir. Jan. 15, 1987).

Even if they did request the filing of a grievance, the employees did not file a breach of the duty of fair representation claim against the OCAW for not filing any grievance within six months of the breach.[1] As the defendants have stated, these allegations are essential to a section 301 claim by the plaintiffs. The Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 186 (1967), held that an "employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached the duty of fair representation in the handling of the employee's grievance." But according to the plaintiff's cross motion of summary judgment, "no union member has claimed the union breached its duty of fair representation." [No. 65, p. 60, 7/10/85].

As a matter of fact, the plaintiffs contend that the Union itself is the party injured by Allied's breach of the collective bargaining agreement. *Id*. OCAW's claim of breach of the agreement is also barred by the Union's failure to exhaust the grievance and arbitration procedures of the agreement. *See e.g.*, *Apponi v. Sunshine Biscuits, Inc.*, Nos. 85-3782/3783, slip op. 8, (6th Cir. Jan. 15, 1987)[2] Additionally, this action was not filed within the six-month statue of limitations. *DelCostello*, 462 U.S. 151.

Accordingly, after consideration of the entire record and for the foregoing reasons,

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

(1) That the Magistrate's report and recommendation is

approved and adopted as and for the opinion of the Court;

(2) That in conformity with the recommendation, the defendant Allied's motion for summary judgment is SUSTAINED, and the defendant Armco's motion for summary judgment is SUSTAINED;

(3) That this action is DISMISSED and shall be STRICKEN from the docket.

This 1 day of April, 1987.

Henry R. Wilhoit, Jr., Judge

---

[1] The plaintiffs have stated, "[N]o union member has claimed the union breached its duty of fair representation. [No. 65. p. 60, 7/10/85].

[2] *Apponi, supra,* is distinguishable; the action at bar clearly implicates the union's duty of fair representation on a matter that was arbitrable under the agreement.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 83-282
DECIDED JANUARY 6, 1987
ROBERT ROWE AND EUGENE S. DUNCAN, PLAINTIFFS,

VS.

ALLIED CHEMICAL HOURLY EMPLOYEES
PENSION PLAN AND ALLIED CORPORATION, DEFENDANTS.

AND

CIVIL ACTION NO. 84-278
OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, ET AL, PLAINTIFFS,

VS.

ALLIED CORPORATION, ET AL, DEFENDANTS.

MAGISTRATE'S REPORT AND RECOMMENDATION

This matter is presently before the undersigned for a report and recommendation upon the parties' cross-motions for summary judgment. 28 U.S.C. Section 636(b) (1) (B).

By Order dated September 18, 1986, the court granted partial summary judgment in this action dismissing the claims of the Group 1 and 2 plaintiffs[1] The court reserved decision upon the claims of the Group 3 plaintiffs and the Oil, Chemical and Atomic Workers Union (OCAW) contained in Counts V, VA and V1 of the first amended complaint[2] It is those claims that the undersigned now addresses. The facts relevant to the instant dispute and greatly abbreviated are set out below.

On December 31, 1981 Armco, Inc. (Armco) purchased from Allied Corporation (Allied) a coke plant located in Ashland, Kentucky. Prior to the sale Allied and Armco representatives met on various occasions to discuss the terms of the sale including

Armco's intentions regarding the social security option contained in Section VII of the Allied Plan. It is undisputed that Armco informed Allied the Armco Pension Plan contained no such option and that none would be made available to Allied employees who chose to accept employment with Armco. Allied then "counseled" the Group 3 plaintiffs that should they choose to accept employment with Armco rather than retire under the Allied Plan they would lose their social security option as the Armco Plan contained no such provision. The Group 3 plaintiffs chose to retire. The instant dispute erupted when subsequent to the sale, Armco, contrary to its earlier assertions, made the social security option available to former Allied employees who went to work with Armco.

As such the Group 3 plaintiffs allege in Count V of the first amended complaint that Allied and/or its Plan wrongfully induced their retirement and that Allied's actions constituted willful or negligent misrepresentation in violation of the Allied Plan and fiduciary duties of section 404 of the Employment Retirement Security Act of 1974 (ERISA), 29 U.S.C. Section 1104, and common law duties. It is further alleged in Count VI that by violating the provisions of the Plan, Allied breached its collective bargaining agreement with the OCAW..

Further, based upon the above set forth facts, the Group 3 plaintiffs allege in Count VA that Armco's failure to inform either Allied or themselves of its intention to furnish the social security option constituted willful or negligent misrepresentation in breach of fiduciary duties of the Armco Plan in violation of Section 404 of ERISA, 29 U.S.C. Section 1104, and common law duties.

COUNT V

Allied first asserts that plaintiffs' claims contained in Count V are barred by the relevant statute of limitations. In this regard Allied argues for application of a six month period for suing such as is used in a "hybrid" suit for breach of the union's duty of fair representation and for breach of contract under section 301 of the Labor Management Relations Act, 29 U.S.C.. Section 185.

See DelCostello v. Teamsters, 462 U.S. 151 (1983). The six month period of limitations for the bringing of an action was recently rejected for actions brought under section 1132. *See, e.g., Salyers v. Allied Corporation*, 642 F. Supp. 442 (E.D. Ky. 1986). Further, as the present action is one for relief from breach of fiduciary responsibility as set forth in section 1104, the relevant period of limitations is that contained in section 1113 of ERISA. *See* 29 U.S.C. Section 1113; *Knutz v. Reese*, 760 F.2d 926, 936-937 (9th Cir. 1985), *vacated on other grounds* 785 F.2d 1410 (9th Cir. 1986). As plaintiffs' claims were well within the limitation period set forth in section 1113, they are not now barred[3]

The Allied defendants next seek summary judgment on the grounds the allegations of misrepresentation do not state a claim of ERISA violations. Their argument in this regard is that even assuming that Allied failed to provide information regarding the future availability of the social security option, ERISA does not require them to provide such information. Further, they argue the social security option is not in itself a pension benefit but merely an alternative form of payment of the 80 point early retirement benefit and as early retirement benefits are not "accrued benefits" they are not entitled to ERISA protection. *See, e.g., Sutton v. Weirton Steel Div.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984).

Although ERISA provides a federal cause of action to consider allegations that a pension plan fiduciary has misrepresented a fact and/or quality of plan coverage, *Ogden v. Michigan Bell Telephone Co.*, 571 F. Supp. 520, 521 (E.D. Mich. 1983), review under ERISA's fiduciary standards is proper only in reference to accrued benefits. *Sutton*, 724 F.2d at 410; *United Electrical Radio and Machine Workers of America v. Amcase Industrial Corp.*, 634 F. Supp. 1135, 1142 (S.D. Ohio 1986). As the social security option was a mere means of payment of an early retirement benefit, it was not an accrued benefit. *E.g., McBarron v. S & T Industries, Inc.*, 771 F.2d 94, 99 (6th Cir. 1985); *Bencivengo v. Western Pennsylvania Teamsters*, 763 F.2d 574, 578 (3d Cir. 1985). As the option was not an accrued benefit, the Allied defendants were not under an ERISA-created fiduciary

duty in respect to same. *United Electrical Radio*, 634 F. Supp. at 1142. Accordingly, Count V fails to state a claim against the Allied defendants under ERISA. *Id.*

It is necessary to now look to the viability of plaintiffs' common law claims of misrepresentation against the Allied defendants[4] In this regard plaintiffs assert the Allied defendants are governed by the standards set forth in the Restatement (Second) Torts Section 552 dealing with the negligent supplying of information[5] *See Ingram Industries, Inc. v. Nowidke*, 527 F. Supp. 683 (E.D. Ky. 1981) (scope of liability of an accountant for negligence causing loss to a third party).

It is not disputed that Allied counseled the Group 3 plaintiffs that Armco would not offer the social security option. It is further obvious the Group 3 plaintiffs relied, justifiably, upon those assertions in choosing to retire from Allied and forgoing employment with Armco. As this information subsequently proved to be false, the question becomes whether Allied failed to exercise reasonable care in obtaining this information. *See* Restatement (2d) Torts 552(1).

The undisputed facts of the case lead the undersigned to believe Allied did not so fail. Prior to the plant sale Allied and Armco representatives met on various occasions to discuss the terms of the sale. During these meetings Allied was informed that the Armco Pension Plan contained no social security option and Armco had no intention to provide such option to the Allied employees. Further, immediately prior to the sale at a meeting between Allied and OCAW representatives, Allied counseled the OCAW that the social security option would not be offered by Armco. These comments raised no objection from an Armco representative attending the meeting for the express purpose of ensuring that the information conveyed by Allied was consistent with Armco's understanding and intentions[6]

It can hardly be said Allied acted unreasonably in relying upon the repeated assurances of Armco that no social security option would be provided. The undersigned is at a loss at to what more Allied could have done to ascertain Armco's intentions in this regard.

Accordingly, it is recommended that the Allied defendants' motion for summary judgment as to Count V be granted.

COUNT VA

As stated earlier, the Group 3 plaintiffs allege in Count VA the Armco defendants' failure to inform either Allied or themselves of its intention to furnish the social security option constituted misrepresentation in breach of ERISA fiduciary and common law duties.

Armco first argues that as ERISA prohibits any but those who are participants in or beneficiaries of a plan from suing for an alleged breach of duties by the fiduciaries of the plan and as the Group 3 plaintiffs are clearly neither, this court lacks subject matter jurisdiction. *See* 29 U.S.C. Section 1132(a) (1) (B); *Kuntz*, 785 F.2d 1410; *Freeman v. Jacques Orthopaedic Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 655-56 (9th Cir. 1983), *Pressrooms Union v. Continental Assurance Co.*, 700 F.2d 889, 893 (2nd Cir. 1983); *Nugent v. Jesuit High School for New Orleans*, 625 F.2d 1285, 1987 (5th Cir. 1980).

The Group 3 plaintiffs argue that by agreeing in principle and under the sales agreement to the preservation of pension rights, Armco conferred "unknowing" participant status upon the Group 3 plaintiffs and thereby became a "constructive fiduciary." The undersigned finds this argument less than compelling. The language of section 1132 requires one be a participant to bring suit under ERISA. *Id.* Despite plaintiffs' vague protestations to the contrary, they can in no way be viewed as participants when they were never employed by Armco? *Freeman*, 721 F.2d at 656. As the Group 3 plaintiffs are not participants, this court lacks subject matter jurisdiction under 29 U.S.C. Section 1132. *Id.*

Accordingly, it is recommended that the claims of the Group 3 plaintiffs against the Armco defendants contained in Count VA be dismissed for want of subject matter jurisdiction without prejudice to state law claims they might pursue.

COUNT VI

Plaintiffs have at various times attempted recharacterization of Count VI of the amended complaint as either a claim brought on behalf of the OCAW under section 301 of the LMRA, 29 U.S.C. Section 185, or an ERISA claim under section 502. Plaintiffs latest interpretation appearing in the response casts Count VI as one for breach of fiduciary duty resulting from Allied's alleged breach of the collectively bargained agreement between Allied and the OCAW brought on behalf of the Group 3 plaintiffs[8] If viewed in this manner Count VI must fail for the reasons set forth earlier in the discussion of Count V. A similar result obtains if Count VI is viewed, as it appears on its face, as a section 301 claim brought on behalf of the OCAW.[9]

If so viewed, Count VI must be dismissed as outside the applicable period of limitation. *See, e.g., DelCostello*, 462 U.S. at 151); *Local Union 3- 523, OCAW v. Allied Corp. and Armco, Inc.*, Catlettsburg Civil Action No. 82-202, Memorandum Opinion and Order (E.D. Ky., November 22, 1983). Further, the alleged breaches of the collectively bargained plan upon which Count VI is founded are believed to be without merit by the undersigned based upon the reasoning in the earlier report and recommendation as adopted in the Memorandum Opinion and Order dated September 18, 1986 and as set forth herein above. As such Count VI should be dismissed.

Accordingly, for the above-stated reasons, it is hereby recommended that the Allied and Armco defendants' motions for summary judgment as to the claims of the OCAW and Group 3 plaintiffs contained in Counts V, VA and VI be granted.

Objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same or further appeal is waived. *Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1984), *aff'd*, 474 U.S. __, 38 CrL 3031 (December 4, 1985); Rule 72(b), Fed.R.Civ.P.

This the 6th day of January, 1987.

JOSEPH M. HOOD
UNITED STATES MAGISTRATE

Date of Entry and Service:

---

[1] The factual background surrounding the present dispute is fully set forth in the earlier Report and Recommendation of the undersigned and in the Memorandum Opinion and Order adopting same. A such it will not be repeated herein except as necessary.

[2] The Group 3 plaintiffs are those plaintiffs who retired from Allied and forewent employment with Armco. At the time of retirement all but one of the Group 3 plaintiffs were eligible for the "social security" or "level income" option contained in Article VII of the Allied Plan. Under this option an employee retiring before reaching eligibility for social security receives a level total retirement income by receiving higher than normal pension benefits before his federal social security benefits commence and lower pension benefits thereafter.

[3] 29 U.S.C. Section 1113:

1113. Limitation of actions

(a) No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of —

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

[4] The Allied plaintiffs argue these claims are preempted by ERISA's broad sweep. *See, e.g., Metropolitan Life Insurance v. Massachusetts*, __ U.S. __, 105 S.Ct. 2380, 2389 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98-100 (1983). However, it is obvious that as the present claims do not fall within ERISA's protection, neither are they subject to ERISA preemption. *See, Ogden*, 371 F. Supp. at 523 (state law claims preempted only when another remedy is provided for the wrong alleged).

[5] Restatement 2d Torts Section 552 states in relevant part:

> Section 552. Information Negligently Supplied for the Guidance of Others
>
> (1) One who, in the course of his business, profession or employement, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to *exercise reasonable care or competence* in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty if created, in any of the transactions in which it is intended to protect them. The standards impose a discreet and definite burden upon the plaintiff. He must establish by the evidence and persuade the fact finder that the limiting factors to liability have been overcome. Whether the plaintiff is able to carry this burden can only be assessed in light of the total evidence presented by the contending parties. Therefore, the issue cannot be decided until the facts are fully presented. At trial on the merits, the Court believes the parties will raise the issue and the required standards can then be added.

(emphasis added).

[6] It would appear Allied's first knowledge of Armco's intention to provide the social security option was acquired some ten months after the sale when Armco officials first notified former Allied employees of their intention to provide same.

[7] As the gist of the plaintiffs' complaint is that they forewent employment with Armco based upon misrepresentation, they cannot now argue they are participants in Armco's Plan. *See Freeman*, 721 F. 2d at 656 (the very thrust of Freeman's complaint is that he did not participate in the plan because he

was mislead to the cost of participation. Yet, for whatever reason, he did not in fact participate. "This court cannot rewrite history and declare that he did participate").

[8] If this claim is construed as being brought on behalf of the OCAW under section 502, it must be dismissed as the union has no standing to bring such suit. *See, e.g., District 65, UAW v. Harper & Row Publishers, Inc.*, 576 F. Supp. 1468, 1476 (S.D. N.Y. 1983).

[9] Allied correctly notes that it must be assumed Count VI is raised by the Union plaintiffs as the Group 3 plaintiffs have not alleged that the OCAW breached its duty of fair representation and as such their claims are barred. *Vaca v. Sipes*, 386 U.S. 171, 185-187 (1967).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 83-282
DECIDED SEPTEMBER 18, 1986

ROBERT ROWE and
EUGENE S. DUNCAN, PLAINTIFFS

VS.

ALLIED CHEMICAL HOURLY EMPLOYEES'
PENSION PLAN AND ALLIED CORPORATION, DEFENDANTS

AND

CIVIL ACTION NO. 84-278

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, ET AL., PLAINTIFFS

VS.

ALLIED CORPORATION, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

This matter is currently pending before this Court upon cross-motions for summary judgment. Pursuant to 28 U.S.C. section 636(b) (1) (B), the matter was referred to the United States Magistrate Joseph M. Hood for initial consideration and recommendation. The Magistrate has filed his report and recommendation, which recommends granting of summary judgment to the defendants. The plaintiffs have filed objections to the report and recommendation, and the defendants have filed responses to the objections.

This action arises out of the sale of a coke plant by the defendant Allied Corporation [hereinafter Allied] to the defendant Armco, Inc. [Armco] on December 31, 1981. Before the sale, the

plaintiffs were hourly employees of Allied and members of the Oil, Chemical Atomic Workers Union [OCAW]. These employees were covered by the Allied pension plan which was the product of collective bargaining between Allied and the OCAW. The following three provisions in the Allied plan are the subject of this lawsuit:

(1) *Article IV(2) (a)* contains an 80-point early retirement provision which permits retirement when an employee's age and length of service equal 80. The plaintiffs who accepted employment with Armco and were eligible for the 80-point retirement before or at the time of sale and are referred to as the Group 2 plaintiffs.

(2) *Article IX(4) (a)* enables an employee laid off within three (3) years of the date of eligibility for an 80-point pension to receive credit for the period of the lay-off towards an 80-point retirement. The plaintiffs who accepted employment with Armco and were within three years of reaching eligibility for an 80-point pension at the time of sale are known as Group 1 plaintiffs.

(3) *Article VII* provides a "Social Security" or "level income" option which enables an employee retiring before reaching eligibility for social security to receive a level total retirement income by paying the pensioner higher than normal pension benefits before his social security benefits begin and lower pension benefits thereafter. The plaintiffs who retired from Allied and did not accept employment from Armco are referred to as the Group 3 plaintiffs.

It should be noted that the Magistrate has not discussed the claims of the Group 3 plaintiffs because the record was not stipulated as sufficient; therefore, the report and recommendation did not concern Count VA[1] of the amended complaint nor the majority of OCAW's claims which concerned the Group 3 plaintiffs. The parties will be directed to file supplemental motions and memoranda regarding these claims.

The claims of the Group 1 and 2 plaintiffs involve an employee pension benefit plan which must be reviewed under ERISA, 29

U.S.C. section 1001, *et seq.*

In Counts I and III, Group 1 and 2 plaintiffs respectively asset that allied and its Plan wrongfully denied benefits under 29 U.S.C. section 1132, and thereby breached fiduciary duties under section 404 of ERISA, 29 U.S.C. section 1104.

In Counts II and IV, Group 1 and 2 plaintiffs allege that Allied and its Plan violated section 208 of ERISA, 29 U.S.C. section 1058, by failing to transfer sufficient assets to Armco's Plan to pay 80-point pensions to Group 1. The plaintiffs also assert this insufficient transfer was a breach of fiduciary duty under section 404.

The last count involving Group 1 and 2 plaintiffs is Count VI which alleges Allied breached its collective bargaining agreement with the OCAW by violating provisions of the Allied Plan and thereby violated section 301 of the LMRA, 29 U.S.C. section 185.

The standard of review by this Court of the plan administrators' actions is whether the actions were arbitrary or capricious. This is the law in the Sixth Circuit although the plaintiffs object and argue they should receive *de novo* review. *See Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985).

The Magistrate is correct in stating that the gravamen of the Group 1 and 2 plaintiffs' argument is that Allied's sale of the coke plant to Armco triggered their entitlement to the Allied 80-point pension.

The Group 1 plaintiffs contend that the sale of the coke plant resulted in a lay-off and that as laid-off employees, they continued to accumulate service credit under Article IX(4) (a) of the Allied Plan while employed by Armco. The defendants argue that the Group 1 plaintiffs were never laid-off within the meaning of Article IX(4) (1) and thus were not eligible for the Allied 80-point pension benefit: these plaintiffs suffered no break in employment. The Magistrate accepted the defendants position on this argument and bolstered his conclusion by referring to holdings in cases with similar situations. The plaintiffs object to

the Magistrate's conclusion and still contend that Group 1 plaintiffs were "laid-off" because Armco did not allow them to continue earning credit toward the 80-point pension. The Court has considered the record and the arguments and finds that the Group 1 plaintiffs were not entitled to the Allied 80-point pension because they were not "laid-off" within the meaning of the Allied Plan and did not suffer a break in employment. Therefore, the defendants' decision that the Group 1 plaintiffs ceased to be Allied employees before satisfying the conditions for eligibility under the Plan was neither arbitrary nor capricious.

As for the claims of Group 2 plaintiffs, the Magistrate states that the defendants' decision to deny benefits to these employees had a reasonable basis since the Group 2 plaintiffs failed to retire while they were still employed by Allied and under the Allied Plan. Retirement was a prerequisite to receiving the 80-point pension under the Allied plan. These plaintiffs argue that the defendants acted arbitrarily and capriciously by imposing a condition not contained in the Allied Plan—i.e. that they choose between employment with Armco and their entitlement to benefits under the Allied Plan. As the Magistrate has stated, these plaintiffs failed to retire while employed by Allied. The Court finds that the defendants did not unilaterally amend the Allied Plan as the plaintiffs contend. The Court further finds that the defendants' decision to deny Group 2 plaintiffs benefits was neither arbitrary nor capricious.

Finally, the plaintiffs argue that the defendants violated section 208 of ERISA, 29 U.S.C. section 1058, by failing to transfer sufficient assets to the Armco Plan, and that this insufficient transfer prevents the Group 1 and 2 plaintiffs from receiving benefits equal to or greater than they were entitled to immediately before the transfer.[2] The Magistrate concluded that even if the transfer did cause a disparity in the plaintiffs' early retirement benefits, such transfer did not violate section 208, which has been read to require that the benefits to be compared on a termination basis be accrued benefits, because early retirement benefits are not accrued benefits according to the Sixth Circuit. *See McBarron v. S & T Industries, Inc.*, 771 F.2d 94, 99

(6th Cir. 1985); *accord Bencivenga v. Western Pennsylvania Teamsters and Employees Pension Fund*, 763 F.2d 574 (3d Cir. 1985).

The plaintiffs have objected to the Magistrate's conclusion and now assert that early retirement benefits *are* accrued benefits according to the Second Circuit in *Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2d Cir. 1985). The plaintiffs argue that the Court should apply *Amato, supra*, and that *McBarron* did not concern early retirement benefits. In *McBarron, supra*, the Sixth Circuit stated: "In our view, ERISA does not give an employee any nonforfeitable right to early retirement benefits. The express wording of the statute makes this clear: 'Each pension plan shall provide that an employee's right to *normal* retirement benefits is nonforfeitable upon the attainment of *normal retirement age*.' " *Id.*, at 99 (emphasis is original). Accrued benefits are nonforfeitable. The Court finds that the defendants' transfer of assets into the Armco Plan did not violate section 208.

Accordingly, the Court can find no breach of fiduciary duty by the defendants under section 404 of ERISA, 29 U.S.C. section 1104, or common law.

It should be noted that the plaintiffs have objected to the Magistrate's statement that any state law claims which the plaintiffs have attempted to or may assert should be disregarded give the broad sweep of ERISA; the Magistrate cited *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). The plaintiffs assert that such a statement is premature and that each claim should be considered. Since this action concerns an employee pension benefit plan covered by ERISA, 29 U.S.C. section 1101 *et seq*, state law claims would be preempted according to the Supreme Court in *Shaw, supra*.

In summary, the Court finds that the Group 2 plaintiffs were not "laid-off" within the meaning of the Allied Plan and that the Group 1 plaintiffs did not retire while employed by Allied and while they were participants under the Allied Plan. The Court further finds that the decisions of the defendants relating to the retirement benefits of the plaintiffs in Groups 1 and 2 were

neither arbitrary nor capricious. The Court can find no breach of fiduciary duty by the defendants under 29 U.S.C. section 1104.

IT IS THEREFORE ORDERED AND ADJUDGED AS FOLLOWS:

(1) That the defendants' motion for summary judgment is SUSTAINED as to all counts concerning plaintiffs in Groups 1 and 2;

(2) That the plaintiffs' motion for summary judgment is OVERRULED;

(3) That the parties shall file supplemental motions and supporting memoranda regarding the claims for Group 3 plaintiffs on or before Friday, October 24, 1986;

(4) That this action is hereby referred to the United States Magistrate Joseph M. Hood for a report consideration and recommendation concerning the Group 3 plaintiffs' claims and motions.

This 18 day of September, 1986.

Henry R. Wilhoit, Jr., Judge

---

[1] Count VA alleges Armco's failure to inform Allied or the Group 3 plaintiffs of its intention to furnish the Social Security option was wilful or negligent misrepresentation and a breach of fiduciary duty under the Armco Plan and common law.

[2] Section 208 of ERISA provides: "A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan has then terminated).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 83-282

ROBERT ROWE and
EUGENE S. DUNCAN, PLAINTIFFS,

VS:

ALLIED CHEMICAL HOURLY EMPLOYEES'
PENSION PLAN AND ALLIED CORPORATION, DEFENDANTS.

AND

CIVIL ACTION NO. 84-278

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, ET AL, PLAINTIFFS,

VS:

ALLIED CORPORATION, ET AL, DEFENDANTS.

MAGISTRATE'S REPORT AND RECOMMENDATION

This matter is presently before the undersigned for a report and recommendation upon the parties cross-motions for summary judgment[1]

This action arises out of the sale of a coke plant by the defendant Allied Corporation (Allied) to the defendant Armco, Inc. (Armco) on December 31, 1981. Until the time of the sale, the individual plaintiffs in this action were hourly employees of Allied and members of the Oil, Chemical and Atomic Workers Union (OCAW).

These employees were covered by a pension plan (the Allied Plan) which was the product of collective bargaining between Allied and the OCAW. The Allied Plan contains three provisions which are now the subject of this litigation.

Article IV(2) (a) of the Allied Plan contains an 80 point early

retirement provision permitting retirement when an employee's age and length of service equal 80. The plaintiffs eligible for 80 point retirement at or before the time of sale who accepted employment with Armco are referred to as Group 2 plaintiffs.

Article IX(4) (a) of the Allied Plan enables an employer laid-off within three years of the date of eligibility for an 80 point pension to receive credit for the period of lay-off towards an 80 point pension. The plaintiffs within three years of reaching eligibility for an 80 point pension at the time of the sale who accepted employment with Armco are referred to as Group 1 plaintiffs.

Article VII of the Allied Plan proves a "Social Security" or "level income" option which enables an employee retiring before reaching eligibility for social security to receive a level total retirement income by paying a pensioner higher than normal pension benefits before his federal social security benefits commence, and lower pension benefits thereafter. Plaintiffs who retired from Allied and forewent employment with Armco are referred to as Group 3 plaintiffs.

Counts 1 and III of the complaint apply to Groups 1 and 2 respectively. Both counts present claims brought under section 502 of the Employment Retirement Security act of 1974 (ERISA), 29 U.S.C. Section 1132, for wrongful denial of benefits under the allied Plan. Each count also alleges that the failure of Allied and its Plan to pay such benefits constitutes a breach of fiduciary duties in violation of section 404 of ERISA, 29 U.S.C. Section 1104.

Counts II and IV assert statutory violations of ERISA under section 208, 29 U.S.C. Section 1058. Count II alleges that by failing to transfer assets to Armco's Plan sufficient to pay Group I 80 point pensions, Allied and its Plan violated section 208 and their fiduciary duties under section 404. Count IV alleges that the transfer resulted in a dimunition of the benefits to which Group 1 and 2 plaintiffs were entitled in violation of section 208.

Count V alleges that Allied and or its Plan wrongfully induced Group 3 plaintiffs to retire and that same constituted wilful or

negligent misrepresentation in violation of the Allied Plan and fiduciary duties of section 404 and common law duties.

Count VA alleges that the failure of Armco to inform Allied or the Group 3 plaintiffs of their intention to furnish the Social Security option constituted wilful or negligent misrepresentation and that such conduct was a breach of fiduciary duties of the Armco Plan in violation of section 404 and common law duties.

Count VI is brought under section 301 of the LMRA, 29 U.S.C. Section 185, and alleges that by violating the provisions of the Plan as set forth in the prior courts allied breached its collective bargaining agreement with OCAW.

As it has not been stipulated that the record is sufficient to enable the undersigned to address the claims which Group 3 plaintiffs assert against the Armco defendants in Count VA of the amended complaint, in the interest of judicial economy the undersigned withholds discussion of all Group 3 claims pending filing of supplemental motions. Further, inasmuch as the claims asserted on behalf of the OCAW are in large part based upon the Group 3 claims, the undersigned defers discussion of these claims until such time as the Group 3 claims can be resolved.

The Allied Plan which lies at the heart of the Group 1 and 2 plaintiffs' claims is an "employee pension benefit plan, and as such must be reviewed in terms of (ERISA), 19 U.S.C. Section 1001, *et seq*? The role of the court is, therefore, limited to determining whether the actions of the plan administrators were arbitrary and capricious. *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985); *Moore v. Reynolds Metals Co. Retirement Program*, 740 F.2d 454 (6th Cir. 1874), *cert. denied*, 105 S.Ct. 786 (1985); *Washburn v. Allied Corporation*, Ashland Civil Action No. 83-295 (E.D. Ky. December 20, 1985) (Wilhoit, J.).

The gravamen of Group 1 and 2's argument is that Allied's sale of the coke plant to Armco triggered their entitlement to the Allied Plan's 80 point pension.

Group 1 plaintiffs claim that the sale of the plant resulted in

a lay-off, and, that as laid-off employees, they continued to accrue service credit under Article IX(4) (a) of the Allied Plan. The Allied defendants state that these plaintiffs were not "laid-off" within the meaning of Article IX(4) (a), as they suffered no break in employment, and thus are not eligible for the Allied 80 point benefit because they ceased to be Allied employees before they satisfied the preconditions for eligibility. Group 1 plaintiffs argue that the denial of benefits based upon the above interpretation is arbitrary and capricious as a period of unemployment cannot be considered the *sine quo non* for benefits under Article IX(4) (a) without contravening its explicit language and purpose.

> Generally speaking, trustees [administrators] are knowledgeable of the details of a trust fund (both its purpose and its operation) and thus they are in a position to make prudent judgments concerning participant eligibility. Courts are extremely reluctant to substitute their judgment for the judgment of the trustees, and will do so only if the actions of the trustees are not grounded on any reasonable basis.

Blakeman, 779 at 1150 (citing *Ponce v. Construction Labours Pension Trust for Southern California*, 628 F.2d 537, 542 (9th Cir. 1980).

Article IX(4) (a) does not explicitly define what constitutes a "lay-off" or implicitly require the reading propounded by the Group 1 plaintiffs. The uncontroverted facts show that none of the Group 1 plaintiffs were eligible for an 80 point pension while employed at Allied; all went directly from Allied to Armco without a break in employment; and each received credit under the Armco Plan for his years of service with Allied.

The record shows that the Allied defendants made clear distinctions between employees who were "laid-off" prior to the sale and those who would continue in employment with Armco. (*See* Stipulation of Fact 6, 19; Attachment H - Memorandum of Understanding between Armco, Inc. and United Steelworkers of America). The Allied defendants' interpretation of Article IX(4) (a) to require an employee to suffer a period of unemployment to be deemed "laid- off" is consistent with their prior

practice and supported by the weight of authority. *See, e.g.*, *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985); *Pabst Brewing Co. v. Anger*, 610 F. Supp. 214 (D. Minn. 1985). The decision of the Allied defendants that Group 1 plaintiffs ceased to be Allied employees before satisfying the preconditions for eligibility under the Plan was neither arbitrary nor capricious. *See, e.g.*, *Blakeman*, 779 at 1150, 1151.

A similar result obtains as to the Group 2 plaintiffs. These plaintiffs argue that Allied's denial of benefits was arbitrary and capricious in that it required that they retire from Allied or accept employment with Armco, a condition not contained in the Plan.

The Allied defendants contend that Article IV(2) (c) requires that an employee retire from Allied before he can receive retirement benefits and that Group 2 plaintiffs declined to retire while they were still allied employees and participants in the Allied Plan.

The facts again are uncontroverted that each Group 2 plaintiff was counseled by Allied representatives before the plant sale that he could either retire from Allied and receive the 80 point pension or go to work for Armco and become a participant in Armco's pension plan eligible for a pension upon retirement from Armco. Upon their decision not to retire from Allied, assets to fund their 80 point benefits were transferred by Allied to Armco.

Plaintiffs have attempted to argue throughout that the Allied defendants acted arbitrarily and capriciously in their denial of benefits in that they imposed a condition or standard not contained in the plan, *i.e.*, that plaintiffs choose between employment with Armco or their entitlement to benefits under the Allied Plan[3] The record, however, clearly shows this argument to be a mischaracterization as the plaintiffs were denied benefits on the grounds that they failed to satisfy preconditions of the Plan, *i.e.*, retirement from Allied, while a participant of the Plan. The choice made by the plaintiffs of whether to seek benefits under the Allied plan or go to work for Armco was not used by Allied in the determination of eligibility for benefits but rather

in the determination of whether to transfer assets from the Allied Plan to the Armco Plan on behalf of these employees.

Plaintiffs obviously could have chosen to retire from Allied and then put in an application with Armco (or other employers) and taken their chances of being hired. Instead, they chose guaranteed employment with Armco under the Sales Agreement at which point Allied transferred assets to fund their Armco Pension. Thus, when plaintiffs later sought benefits from Allied, the Allied defendants, quite reasonably, determined that plaintiffs had failed to retire while Allied employees and participants in the Allied Plan. The undersigned finds the decision to deny Group 2 plaintiffs benefits to be grounded on a reasonable basis and in no way arbitrary or capricious. *Id.*

Plaintiffs further contend that the Allied defendants violated section 208 of ERISA, 29 U.S.C. Section 1058, in that they failed to transfer sufficient assets and that same renders Group 1 and 2 plaintiffs unable to receive benefits equal to or greater than the benefits to which they were entitled immediately before the transfer.[4] Even assuming the transfer to cause a disparity in plaintiffs' early retirement benefits, section 208 has been read to require that the benefits to be compared on a termination basis be accrued benefits. *See, e.g., Van Orman v. American Ins. Co.*, 608 F. Supp. 13, 25 (D. N.J. 1984). As early retirement benefits do not constitute accrued benefits, their contention is without merit. *McBarron v. S & T Industries, Inc.*, 771 F.2d 94, 99 (6th Cir. 1985); *Bencivenga v. Western Pennsylvania Teamsters and Employees Pension Fund*, 763 F.2d 574 (3d Cir. 1985); *Sutton v. Weirton Steel Div. of Nat. Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 2387 (1984).

The Group 1 and 2 plaintiffs also claim that the defendants breached fiduciary duties contained in section 404 of ERISA, 29 U.S.C. Section 1104. However, as the early retirement benefits in issue are not subject to ERISA protection as accrued benefits, *id.*, and for the reasons set forth above, these claims also must fail.

Accordingly, for the above-stated reasons, it is hereby recommended that the defendants' motions for summary judgment be

granted in respect to the claims set forth on behalf of the Group 1 and 2 plaintiffs[5]

Objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same orr further appeal is waived. *Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1984), *aff'd*, __ U.S. __, 38 CrL 3031 (December 4, 1985); Rule 72(b), Fed.R.Civ.P.

This the 10th day of June, 1986.

JOSEPH M. HOOD
UNITED STATES MAGISTRATE

---

[1] This report and Recommendation addresses Civil Action No. 84-2/8, *OCAW International, et al v. Allied Corporation, et at*, and its companion case *Rowe and Duncan v. Allied Corporation, et al*, Civil Action No.. 83-282, said cases being consolidated for purposes of discovery and trial pursuant to Rule 42(a), Fed.R.Civ.P., by Order of this court dated May 17, 1985.

[2] Further, in view of ERISA's broad presumptive sweep, it is readily apparent that to the extent Group 1 and 2 plaintiffs attempt to assert any state law claims they should be disregarded. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

[3] Further, to the extent the Group 2 plaintiffs misled the Allied defendants to believe they would not seek to retire under the Allied Plan and Allied transferred funds in reliance on these declarations, plaintiffs should be estopped from now seeking same. *Appoini v. Sunshine Biscuits, Inc.*, 652 F.2d 643 (6th Cir. 1981).

[4] Section 208 states in relevant part:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan (if the plan then terminated) receive a benefit immediately after the merger, consolidation or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan has then terminated).

[5] The parties should be directed to submit additional memoranda addressing the Group 3 claims.